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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-6292

	BETWEEN	HOUSING NEW ZEALAND LIMITED Plaintiff
	AND	CLAVERDON DEVELOPMENTS LIMITED Defendant

Hearing: 2 February 2010

Counsel: A Ho for Plaintiff
P Chambers for Defendant

Judgment: 19 February 2010 at 4.45 pm

RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON
(Application to set aside Statutory Demand)

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*This judgment was delivered by me on **19 February 2010** at **4.45 pm** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
Gilbert Walker, PO Box 1595, Shortland Street, Auckland
James D Thompson, PO Box 33197, Auckland

[1] The plaintiff, Housing New Zealand Limited, has applied to set aside a statutory demand served on it by the defendant, Claverdon Developments Limited, for $227,505.67, on the grounds that:

a) there is a substantial dispute as to whether or not the debt is due; and

b) the plaintiff is solvent.

[2] The application is made in reliance on s 290 of the Companies Act 1993. Relevantly s 290(4)(a) and (c) states:

> (4) The Court may grant an application to set aside a statutory demand if it is satisfied that:
>
> (a) There is a substantial dispute whether or not the debt is owing or is due; or
>
> (b) ...
>
> (c) The demand ought to be set aside on other grounds.

[3] The respondent opposes the application.

Background

[4] This case involves an agreement between Housing New Zealand and Claverdon dated 21 November 2005, which the parties amended by a further agreement called an amendment agreement dated 2 December 2005.

[5] Under the original agreement, Claverdon agreed to subdivide and build 30 houses on land at Claverdon Drive, Royal Heights, Massey. The agreement specified that the 30 houses were to comprise six three-bedroom houses at $400,000 per house, 19 four-bedroom houses at $425,000 per house and five five-bedroom houses at $455,000 per house (a total purchase price of $12,750,000). All 30 houses were to be double storey houses except for seven of the four-bedroom houses. The agreement did not differentiate in price between the single storey four-bedroom houses and the double storey four-bedroom houses. Housing New Zealand could request variations in the design specifications for the houses, in which case the

formal variation procedure would apply in accordance with clause 5 of the agreement. The procedure required Housing New Zealand's written approval to any price increases for inclusion in the purchase price for the completed houses.

[6] Clause 7.4 of the agreement also provided that the purchase price for each house was to be paid on a turn-key delivery basis. However, Claverdon was unhappy with this payment structure. It wrote to Housing New Zealand on 17 November 2005 proposing that it be replaced with a progress payment schedule. Housing New Zealand wrote back on 23 November and advised of its agreement to the payment schedule and that it would arrange for an amended contract to be prepared for signing. This led to the signing of the amendment agreement on 2 December 2005.

[7] In the amendment agreement the parties adopted a payment schedule that is found at annexure A to the agreement. Although not entirely clear, it would appear that annexure A reproduces the progress payment schedule that Housing New Zealand agreed to in its letter of 23 November. Whether or not that is the case, the effect of annexure A was to replace the previous turn-key arrangement with an overall purchase price of $12,750,000, to be paid as follows:

a) First, by a "first stage" payment of $2,565,513 upon transfer of the title to the land to be subdivided and developed to Housing New Zealand.

b) Secondly, by a series of monthly progress payments up to a total of $2,594,484 for subdivision works billed by monthly notice from Claverdon and certified by Housing New Zealand's representative.

c) Thirdly, by a single "last stage" payment of $7,590,003 to be made for the houses on Residence Settlement Date, which (by definition) will occur after practical completion and after code compliance certificates and individual fee simple titles have been given for all of the 30 houses, whichever is the later.

[8] Claverdon has completed 17 of the 30 houses and progressively handed over these houses to Housing New Zealand for occupation. The remaining houses have yet to be built and Residence Settlement Date has not been reached.

[9] In accordance with the payment schedule in annexure A, Housing New Zealand paid the first stage payment on the date that it took title to the land to be developed and it paid all of the monthly progress payment claims for subdivision works that Claverdon submitted.

[10] Although the original agreement and the amendment agreement provided for only one further and final payment, it is common ground that Housing New Zealand also approved and paid, on a progressive basis, the invoices that Claverdon issued for the building work required to complete each of the 17 houses. The invoices state they are for 'construction completion' less retentions.

[11] The basis on which Housing New Zealand agreed to make these further progressive payments is disputed. Housing New Zealand says there never was a formal agreement requiring it to make them. It says that it made them as an indulgence to assist Claverdon. Claverdon's evidence is that the payments were made in accordance with a progress claim proposal it put to Housing New Zealand on 12 October 2005 and that when Housing New Zealand signed the amendment agreement it also agreed to that proposal. The contention appears not to be borne out by the amendment agreement itself and raises the question of why the parties would not have adopted the proposal in the amendment agreement itself if indeed they had agreed to adopt the proposal. The contention is also inconsistent with Claverdon's own invoices. The text of each of the invoices, which Housing New Zealand approved progressively between May and December 2008, makes no reference to any 2005 proposal. It does, however, contain the following reference that claims that the invoices are based on a schedule agreed upon almost three years later:

> Claimed amount is as set out in the agreed schedule of staged payments dated **10 June 2008**.
>
> [Emphasis added]

[12] It is against this background that the present dispute arises.

The Dispute

[13] The dispute relates to a further invoice that Claverdon sent Housing New Zealand for $219,161.25 purportedly for a variation in the price of seven of the 17 houses that it has completed. The seven houses are those that have been built on lots 1, 2, 8, 9, 28, 29 and 30, the last of which was completed in December 2008.

[14] The invoice, which is dated 6 April 2009, states that it is a payment claim under the Construction Contracts Act 2002 and identifies the basis for the claimed variation as being an oral variation as follows:

> As discussed and agreed with your Project Manager Mr Dean Kessell and your Mr Patients, Architect the variation costs and design on 7 Single Storey dwellings to Two Storey dwellings on Lots 1, 2, 8, 9, 28, 29 and 30.

[15] Housing New Zealand contends it was surprised by the invoice. It says it has no record of any such variation in design or price being agreed to and that the houses were completed and paid for long before. It responded to Claverdon on 23 April 2009 by solicitor's letter, returning the invoice and disputing its liability to pay the invoice under the original agreement as amended by the amendment agreement.

[16] Almost five months later, on 14 September 2009, Claverdon served its statutory demand on Housing New Zealand for $227,505.67, comprising the $219,161.25 invoiced in April plus interest. Claverdon claims that it is entitled to recover this amount as a debt pursuant to the Construction Contracts Act, essentially, it seems, on the basis that the invoice is a payment claim for a progress payment that Housing New Zealand did not challenge by way of a proper payment schedule.

[17] Housing New Zealand responded to the statutory demand with its application for an order to set it aside.

Issues

[18] At the hearing Housing New Zealand's solvency was not in dispute, but in view of the ruling in *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, counsel for Housing New Zealand quite properly did not advance it as a separate ground for setting aside the statutory demand.

[19] The overarching issue raised for determination was confined to whether there is a genuine and substantial dispute as to whether the sum claimed in the statutory demand is owing and due. For the purpose of determining that issue the parties raised for determination three issues that can be summarised as follows:

a) First, whether it is arguable that Housing New Zealand has no contractual liability for the sum claimed as a variation in the invoice of 6 April 2009 on which the statutory demand is based;

b) Secondly, even if the invoice is a payment claim to which the Construction Contracts Act applies and Claverdon has a contractual entitlement to the sum claimed, whether it is arguable that the payment is not yet due under s 22 of that Act;

c) Thirdly, whether the letter sent by the solicitors for Housing New Zealand on 23 April in response to the invoice amounts to a valid payment schedule under the Act, if indeed Claverdon's invoice is a valid payment claim for debt that is due.

Discussion

[20] I agree with counsel for the applicant that the correct answer on the overarching issue is that there is a genuine and substantial dispute as to whether or not the debt referred to in the statutory demand is owing and due. My reasons follow and are given in relation to the three issues raised for determination above. Those issues are discussed having regard to the principle that it is for Housing New Zealand

to satisfy the Court that it has a genuinely arguable dispute that it is not prevented from raising by the provisions of the Construction Contracts Act.

Issue 1: Is it arguable that Housing New Zealand has no contractual liability for the sum claimed as a variation in the invoice of 6 April 2009 on which the statutory demand is based?

[21] The invoice that lies at the heart of Housing New Zealand's application raises an oral variation for an agreed change from one storey houses to two storey houses for all seven of the houses that are the subject of the dispute. Mr Ellery for Claverdon has deposed that the work claimed for in the invoice was done in accordance with the oral request of Mr Kessell, Housing New Zealand's then representative, and that Mr Kessell asked for the houses to be changed from single storied to double storied. Mr Ellery says:

> I advised Mr Kessell at that time that there would be a change in the square metre costs of this requested increase in build size, that would have to be invoiced separately from those payment claim invoices made in accordance with the Payment Schedule set out in the 12 October 2005 Proposal, once the seven houses had been built, identifying the increase in the cost of build.

[22] At the hearing, counsel for Claverdon confirmed that it is the oral variation that Claverdon relies on.

[23] Just as there are difficulties with Claverdon's assertions about the 12 October progress payment proposal, as I have noted earlier, there are real difficulties with its allegations about the alleged variation. Housing New Zealand's uncontroverted evidence is that from its inception the parties' formal agreement provided for six of the seven four bedroomed houses to be two storied. Housing New Zealand simply did not need a variation to change the design of the four bedroomed houses from single storey to double storey for six out of the seven houses. Housing New Zealand therefore had no reason to approve a variation in price for those six houses. Unsurprisingly Mr Chambers conceded at the hearing, quite properly, that the justification that Claverdon relies on for the variation in price for the six houses appears to lack substance. In these circumstances it is simply not safe to conclude,

on the evidence as it stands, that the oral variation relied on was ever asked for or agreed to.

[24] That brings me to the seventh house. There can be no real dispute that the parties did agree to change this house from a single storied to a double storied house. The plans incorporated in the original agreement show this to be a single storey design and the amendment agreement did not change those plans. On the evidence as it stands, therefore, it can only be assumed that the change was the result of some agreement that the parties came to after the two formal agreements were signed. It does not however follow that there must have been a variation in price. In the parties' original agreement, where the houses were priced individually there was no difference in the price of the one and two storied four bedroomed houses, and in the amendment agreement there was no adjustment to the global price that might indicate a change in that common approach to pricing.

[25] Indeed, as Mr Chambers conceded, the entitlement to a further sum for the change in design to the seventh house is based simply on the very same contentious oral variation that Claverdon relies on with respect to the other six houses, which arguably was never agreed to. Mr Chambers acknowledged that he was unable to point to anything other than the alleged discussion with Mr Kessell to support the oral variation claimed. He recognised that there are no contractual provisions in the original agreement or amendment agreement that support the entitlement to make progress claims for the alleged variation in advance of the last stage payment, and while he initially pointed to the letter of 27 November he properly accepted that the letter does not provide any confirmation that the parties orally agreed that the contract was to be varied to allow for the claimed variation.

[26] I am forced to conclude, in these circumstances, that Housing New Zealand's contractual liability for any part of the sum claimed in the statutory demand, including for the seventh house, is the subject of a real dispute and that Housing New Zealand's claim that it did not agree to a variation to increase the purchase price for any of the houses cannot be lightly dismissed. That is all the more so, given:

a) Claverdon's inability to point to a formal variation made in accordance with the correct contractual procedure; and

b) The dearth of any material of substance that might confirm that there was ever any informal request to vary the price for the seventh house, or indeed any house. The absence of such material seems somewhat irregular when the formal agreement requires variations to be in writing, no doubt to avoid arguments of the present kind.

[27] That, however, is not the end of the matter, because if, as Claverdon claims, the invoice is a payment claim under the Construction Contracts Act, the onus is on Housing New Zealand to show not only that the invoice is genuinely disputed but that it is not prevented from raising the dispute by the provisions of that Act. That brings me to the second issue for determination.

Issue 2: Even if the invoice is a payment claim under the Construction Contracts Act and Claverdon does indeed have a contractual entitlement to the sum claimed, is it arguable that the payment is not yet due under s 22 of the Act?

[28] I accept that Housing New Zealand has an arguable case that payment of the invoice is not due under s 22 of the Act. My brief reasons follow.

[29] Under the Construction Contracts Act, which arguably applies here, progress payments may be claimed by a contractor under statutory default provisions if the parties to a construction contract have not included in the contract an agreed mechanism for determining what progress payments will be made and the date when each of those payments becomes due: see ss 14 and 15.

[30] For the purpose of claiming a progress payment, the contractor, as payee, may serve a payment claim on a payer for a progress payment, which the payer becomes liable to pay on the due date for the progress claim unless the payer provides a payment schedule to the payee: see ss 23 and 24.

[31] However, s 22 provides that liability for paying a claimed amount in a payment claim for a progress payment does not arise until the due date for payment. It states:

> **22 Liability for paying claimed amount**
>
> A payer becomes liable to pay the claimed amount **on the due date for the progress payment** to which the payment claim relates if –
>
> (a) a payee serves a payment claim on a payer; and
>
> (b) the payer does not provide a payment schedule to the payee within –
>
> (i) the time required by the relevant construction contract; or
>
> (ii) if the contract does not provide for the matter, 20 working days after the payment claim is served.
>
> [Emphasis added]

[32] Here, the parties have formally contracted for what is arguably an agreed mechanism by adopting the payment schedule at annexure A to the amended agreement. As noted earlier, the schedule provides for a stage one payment on the transfer of title to the un-subdivided land, subsequent staged payments for subdivision works on a monthly basis and a last stage payment for the entire balance of the contract price on the Residential Settlement Date, when all 30 houses have been completed. In this regard, I accept counsel for Housing New Zealand's submission that arguably here, if one takes the contract works as a whole:

a) the schedule is an agreed mechanism for the progress payments for the entire contract works comprising the subdivision and housing construction works;

b) the progress payments comprise a series of monthly payments for the subdivision works, plus a final progress payment when all of the houses have been completed; and

c) there is only the final progress payment to be made under the mechanism and that is the last stage payment.

[33] If this is correct, then plainly it is arguable that the payment schedule in annexure A to the amendment agreement stands and remains binding on the parties unaffected by the statutory default provisions so that variations, if indeed there are any, will not be due until the Residence Settlement Date. This is because under the variation procedure in clause 5 of the agreement variations, if any, to the houses, would be incorporated in the contract works for the houses, and the last stage payment would be adjusted accordingly.

[34] On this argument, Housing New Zealand would not become liable to pay the claimed amount until the Residence Settlement Date.

[35] For completeness, I note that there was no suggestion in argument that the payment schedule in annexure A to the amendment agreement amounts to a contracting out of the Act in breach of s 12 by effectively disallowing progress payments for the housing part of the contract works. That is hardly surprising because, as s 14 allows, the parties have contracted under their agreement for each payment or series of payments, which they have been careful to identify for the entire subdivision and housing works.

[36] The net result is that, with respect to this second issue, I am satisfied that there is an arguable case that:

a) The parties' formal agreement contains an agreed mechanism as permitted by s 14 for determining what progress payments will be made under the entire construction contract and the date upon which each becomes due;

b) The last stage payment for the housing construction work is one of the agreed progress payments allowed for under the agreed mechanism;

c) As the last stage payment covers all of the construction work for the houses, any variations to those works and related cost increases are payable as part of that payment; and

d) The progress payment claimed under the invoice is not therefore a payment that is due.

[37] I come next to the third and remaining issue.

Payment schedule

Does the letter sent by the solicitors for Housing New Zealand in response to the invoice arguably amount to a valid payment schedule under the Act, if indeed Claverdon's invoice is a valid payment claim?

[38] This issue can be disposed of in short order. Suffice to say that given my findings so far, it is unnecessary to deal with the issue further.

Result

[39] For reasons set out above, I am satisfied there is a genuine dispute as to whether or not the amount claimed in the statutory demand is owing and due. The statutory demand must therefore be set aside. I make an **order** accordingly.

[40] That leaves only the question of costs. As Housing New Zealand is the successful party and costs follow the event under the statutory costs regime, it is appropriate that there be an order for costs in favour of Housing New Zealand against Claverdon. I **order** that Housing New Zealand is entitled to costs on a 2B basis together with disbursements to be fixed by the Registrar.

Associate Judge Sargisson